A L Investors Orlando, LLC, d/b/a The Pavilion at Crossing Pointe *and* Service Employees International Union, 1199 Florida, AFL–CIO, CLC, Petitioner. Case 12–RC–8965

April 29, 2005

DECISION AND DIRECTION

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

The National Labor Relations Board has considered a determinative challenge to an election held October 24, 2003,[1] and the hearing officer's report recommending disposition of it. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 17 for and 14 against the Petitioner, with 3 challenged ballots.[2]

The Board has reviewed the record in light of the exceptions and brief, and adopts the hearing officer's findings, conclusions, and recommendations only to the extent consistent with this Decision and Direction.[3]

The Petitioner challenged the ballot of Carlos Mogollon on the ground that Mogollon was not employed on the stipulated payroll eligibility date of September 13. The hearing officer recommended sustaining the challenge to Mogollon's ballot, finding that Mogollon was not a regular part-time employee because he worked no hours between his layoff on July 5 and his recall on October 16, after the eligibility date. In its exceptions, the Employer argues that the burden was on the Petitioner to establish that Mogollon was not eligible to vote, and that the Petitioner did not meet this burden. The Employer further contends that Mogollon was an eligible voter because he was employed in the stipulated unit as of the election eligibility date, had been temporarily laid off, and had a reasonable expectation of recall.[4] For the reasons discussed below, we agree with the Employer.

Facts

Mogollon was hired on January 7 as a full-time housekeeper (floor tech). Although Mogollon submitted a letter of resignation at the end of that month, Charles Stamey, his immediate supervisor and the Employer's director of housekeeping, convinced Mogollon to continue on as a regular part-time employee. Beginning in March, Mogollon worked twice a week, on Thursdays and Fridays. On March 29, the Employer officially changed Mogollon from full time to part-time status. Thereafter, from March until July 5, he worked an average of 14 hours a week.

In July, Stacy McCanless, the Employer's executive director, told Stamey that "our occupancy was low, and that we needed to cut some hours and that Carlos [Mogollon]—that he needed to cut Carlos' hours, and that when they became available again that he could call him back, but for the time being he needed to, to cut hours." When Stamey responded, "I would like to have him work the hours that I can give him," McCanless agreed. Stamey testified, without contradiction, that he then told Mogollon, "due to occupancy, we do not have as many labor hours that we'd like, and I told him that, you know, there would be some times where we would have to cut hours." Stamey further told Mogollon, however, that he would schedule him for work at "times where I have hours." Mogollon responded, "whenever you have the hours, let me know."[5]

Due to reduced occupancy, Mogollon did not work from July 5 until October 16. During that period, the Employer continued to list him on its maintenance-housing schedule and kept him on the employee phone list and payroll. The Employer also completed weekly time cards showing zero hours for Mogollon.

Between October 16, when he returned to work, and October 25, the day after the election, Mogollon worked 28.5 hours.

Analysis

For the reasons discussed below, we find that Mogollon was a regular part-time employee who had been temporarily laid off. We also find that, as of the payroll eligibility date, he had a reasonable expectation of recall. We therefore find that Mogollon was an eligible voter.

1. Mogollon was a regular part-time employee

In determining whether an individual is a regular part-time employee, the Board considers the length and regularity of his employment. *New York Display & Die Cutting Corp.*, 341 NLRB No. 121, slip op. at 1 (2004). The standard frequently used by the Board to determine the

[1] All dates herein are 2003, unless otherwise specified.

[2] The hearing officer overruled the challenges to the ballots of Kenneth Lee and Mary Cooper. In the absence of exceptions we adopt, pro forma, those recommendations.

[3] In the absence of exceptions we also adopt, pro forma, the hearing officer's recommendation to overrule the Petitioner's Objection 3. The Petitioner originally filed four objections but withdrew Objections 1, 2, and 4.

[4] The Stipulated Election Agreement provided that "eligible voters shall be unit employees . . . including employees . . . temporarily laid off . . ."

[5] Mogollon was not called as a witness.

regularity of part-time employment is whether the employee worked an average of four or more hours a week in the quarter preceding the eligibility date. *Arlington Masonry Supply Co.*, 339 NLRB 817, 819 (2003), citing *Davison-Paxon Co.*, 185 NLRB 21, 24 (1970). However, where employees have experienced lengthy breaks in employment, the Board has looked to the periods both before and after the hiatus to assess whether the employee had sufficient employment to be counted as a regular part-time employee. See *Pat's Blue Ribbons*, 286 NLRB 918, 919 (1987).

During the 4-month period between March and July 5, Mogollon worked 2 days a week (Thursdays and Fridays), 7 hours per day, or 14 hours per week. He did little of that work during the 13 weeks immediately preceding the September 13 eligibility date, but that is because, as we find below, he was laid off on July 5. After returning to work in October, Mogollon resumed his regular Thursday and Friday schedule, working about 14 hours a week, or 28.5 hours in the 2-week period ending the day after the election. Given the length and regularity of his employment both before and after his layoff, we find that Mogollon was a regular part-time employee. *Pat's Blue Ribbons*, 286 NLRB at 919.

2. Mogollon had a reasonable expectation of recall in the near future as of the payroll eligibility date

Consistent with McCanless' instructions, Stamey informed Mogollon that he was being laid off, but would be called back when hours became available again. Stamey's uncontradicted testimony is that he laid Mogollon off on July 5. Although Stamey did not set a specific date for Mogollon's return to work, he made it clear that he would recall him at "times where I have hours," that Mogollon was informed of that fact, and that Mogollon expressed an interest in resuming work when it became available.

To be eligible to vote, a laid-off employee must have a reasonable expectation of recall in the near future as of the payroll eligibility period. *Apex Paper Box Co.*, 302 NLRB 67, 68 (1991). In determining whether employees have a reasonable expectation of recall, the Board examines several factors, including what the employees were told about the likelihood of recall, the circumstances surrounding the layoff, and the employer's past experience and future plans. Id. Applying these factors, we find that Mogollon reasonably expected to be recalled in the near future as of the September 13 eligibility date.[6]

Stamey informed Mogollon that he was being laid off for lack of work and would be called back when there was more work. We find that this statement would reasonably suggest to Mogollon, who expressed interest in whatever work was available to him, that he would soon be recalled. See *Atlas Metal Spinning Co.*, 266 NLRB 180 (1983) (employee had a reasonable expectation of recall, in part because her employer told her that she would be recalled "whenever work picked up").

Significantly, Stamey said nothing to indicate that Mogollon's layoff was anything but temporary. Thus, Stamey did not tell Mogollon: that his layoff was permanent (cf. *Aero Detroit, Inc.*, 321 NLRB 1101, 1104 fn. 19 (1996)); that he should not expect recall in the near future (cf. *Aero Metal Forms*, 310 NLRB 397, 410 (1993)); that he should find other employment or apply for unemployment (cf. *Osram Sylvania, Inc.*, 325 NLRB 758, 760 (1998); *Tomadur, Inc*., 196 NLRB 706, 707 (1972)); or that his insurance benefits would be cancelled (cf. *Aqua-Chem, Inc.*, 288 NLRB 1108, 1110 (1988)). Nor did the Employer take action inconsistent with its position that Mogollon was on temporary layoff status. As stipulated by the parties, there were no documents in Mogollon's personnel file indicating that he had been terminated.

Our dissenting colleague describes Stamey's uncontradicted statement that Mogollon would be recalled when work was available, as too "vague" to warrant a reasonable expectancy of reemployment. We disagree. Mogollon was told expressly that he would return to work as soon as hours increased. The fact that a date certain for recall was not specified is not determinative. Our colleague also states that Mogollon was recalled only after employee Gilbert Pagan quit and there would be no reason why on the payroll eligibility date Mogollon would have anticipated that Pagan would quit. We find, however, that although Mogollon was recalled after Pagan quit, the record does not indicate that Mogollon was recalled because Pagan quit and we reject any implication in our colleague's position to the contrary. A "laid-off employee need only have a reasonable expectancy, not a definite date, of recall." *Atlas Metal Spinning Co*., 266 NLRB at 180.

That the Employer laid Mogollon off because of a temporary downturn in occupancy also supports a reasonable expectancy of recall in the near future. This case is unlike others where the employer's business situation would support an expectation of indefinite layoff. For example, Mogollon was not laid off as part of a general, long-term downsizing of the Employer's work force, cf. *Monroe Auto Equipment*, 273 NLRB 103, 106 (1984); or because the Employer closed its facility, cf. *Sterling Processing Corp.*, 291 NLRB 208, 210 (1988). Rather,

[6] There is no record evidence of the Employer's past experience with layoffs and recalls. For the reasons discussed below, however, we find that the remaining factors support a reasonable expectation that Mogollon would be recalled in the near future.

his layoff was tied to a factor that routinely changes in health care facilities: the patient census.

Apex Paper Box Co., supra, on which our colleague relies, is also clearly distinguishable. There, one of the employer's facilities, including machinery and equipment, was almost completely destroyed by fire. There were no formal plans to rebuild that facility, nor was there a feasible way to recoup the lost production by adding machinery at the employers' remaining facilities. The indefinite nature of the employees' layoff from that facility was obvious. Here, just as obviously, Mogollon's layoff was temporary.

Similarly, our colleague asserts that there was no affirmative showing as to when Mogollon would be recalled. However, that assertion misplaces the burden of proof. As the Employer argues, the burden of proof is on the party who seeks to disfranchise the employee. *Laneco Construction Systems*, 339 NLRB 1048 (2003). Thus, in the instant case, the burden was on the Union to show that Mogollon had no reasonable expectancy of recall in the near future. Concededly, there was uncertainty as to when the patient census would reach the point at which Mogollon could be recalled. However, this does not establish that Mogollon had no reasonable expectation of recall in the near future.

In any event, the Employer's future plan affirmatively supports a finding that Mogollon could reasonably expect recall in the near future. The plan that McCanless and Stamey designed was clear: Stamey needed to lay Mogollon off temporarily because of reduced occupancy, but when hours became available again, Mogollon would be called back. Moreover, the Employer took objective steps to implement the recall plan, by taking actions to facilitate Mogollon's return to work. It kept Mogollon on its employee telephone list and payroll, and completed time cards for him during his employment hiatus. The Employer's actions in this regard resemble those of the employer in *Atlas Metal Spinning*, supra. There, the Board found a reasonable expectation of recall, in part because the employer kept employee Zangrillo on its payroll and allowed her to maintain her health insurance coverage during her layoff to facilitate her return to work. 266 NLRB at 181.

Conclusion

For all the foregoing reasons, we find that Mogollon had a reasonable expectation of recall in the near future as of the September 13 payroll eligibility date. He was, therefore, eligible to vote and his ballot should be opened and counted.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 12 shall, within 14 days from the date of this Decision and Direction, open and count the ballots of Mary Cooper, Kenneth Lee, and Carlos Mogollon. The Regional Director shall then serve on the parties a revised tally of ballots and issue the appropriate certification.

Dated, Washington, D.C. April 29

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting.

It is well established that a laid-off employee's eligibility to vote depends on whether objective factors support a reasonable expectancy of recall in the near future, as of the payroll eligibility date. *Apex Paper Box Co.*, 302 NLRB 67, 68 (1991). This rule "prevents an employer from manipulating factors relating to the likelihood of recall between the eligibility and election dates." Id. In finding Carlos Mogollon eligible to vote, my colleagues essentially ignore the "in the near future" part of the test. Even assuming that Mogollon reasonably expected to be recalled *some day*, there is no basis for finding that as of the payroll eligibility dates he would reasonably have expected recall *in the near future*. I therefore dissent.[1]

In determining whether laid-off employees had a reasonable expectation of recall in the near future, the Board considers what the employees were told about the likelihood of recall, the circumstances surrounding the layoff, the employer's past experience, and its future plans. *Apex Paper Box Co.*, 302 NLRB at 68. None of these factors, taken either separately or together, would support the required belief on Mogollon's part.

The only indication Mogollon received of his possible recall was Supervisor Charles Stamey's promise that he would call Mogollon back when hours "became available again." The record shows no further communication with Mogollon about recall between the time of layoff (July 5) and the payroll eligibility draft (September 13), or for that matter until he was recalled on October 16, which was 8 days before the election. A vague, open-ended promise of this kind is not enough.

[1] I assume, without deciding, that Mogollon was a regular part-time employee.

At most, Stamey's statement indicated only that Mogollon would be recalled when work increased—whenever that might be. There was no estimate of the layoff's duration, let alone any suggestion that it would be short. Indeed, Mogollon was not recalled for more than 3 months after Stamey made that statement, and more than a month after the payroll eligibility date. Even then, he was recalled only after another employee, Gilbert Pagan, quit. On this record, there is no reason why, on September 13, Mogollon would reasonably have anticipated that Pagan would quit and he would be recalled.[2] See *Apex Paper Box Co.*, 302 NLRB at 69 (no reasonable expectation of recall in the near future where, inter alia, employees were recalled solely because of attrition rather than increased production).

Further, as the majority concedes, there is no *evidence* that the Employer had any past practice of laying off and recalling employees that would have caused Mogollon to believe that he would be recalled in the near future. In the absence of evidence of past layoff practice, where an employee is given no estimate of the duration of the layoff or any specific indication as to when, if at all, he will be recalled, the Board has found that no reasonable expectancy of recall exists. *Apex Paper Box Co*., 302 NLRB at 69, citing *Foam Fabricators*, 273 NLRB 511, 512 (1984). That is exactly the situation here.

Nor do the circumstances surrounding Mogollon's layoff support a finding of eligibility. Stamey laid Mogollon off because of a decline in occupancy. The Employer, however, presented no evidence showing "occupancy" at the time of Mogollon's layoff, in the interevening period, or the date of his return.

The complete absence of a past practice of layoffs and recalls distinguishes this case from *Atlas Metal Spinning*, 266 NLRB 180 (1983), cited by the majority. There, as with Mogollon, employee Zangrillo was not given a specific date on which to expect recall, but was informed when she was laid off that she would be recalled "whenever work picked up." And, similarly to Mogollon, Zangrillo was retained on the payroll and allowed to keep her health insurance during her layoff. Unlike Mogollon, however, Zangrillo had previously been laid off and recalled consistent with the employer's cyclical business pattern. The existence of the last, crucial factor enabled the Board to find that Zangrillo had a reasonable expectation of recall in the near future. In contrast, Mogollon had no past experience with predictable layoffs and recalls, but had only Stamey's vague promise on which to base his expectation of recall.

Contrary to the majority's contention, Stamey's promise that Mogollon would be recalled when hours were available, even in conjunction with the steps taken to facilitate his return to work, did not give rise to a reasonable belief that Mogollon would be recalled in the near future. Assuming that this bare promise constituted a "plan" for recall, it was only a plan to recall Mogollon at *some* future time; nothing in it suggests a recall in the *near future* as of the payroll eligibility date. [3]

For all these reasons, I would find Mogollon ineligible to vote.

Dated, Washington, D.C. April 29, 2005

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

[2] The majority asserts that "the record does not indicate that Mogollon was recalled because Pagan quit." This argument neglects the evidence. Stamey testified that the Employer decided in July that it would be easier to hire a full-time, nighttime housekeeper than to call part-timer Mogollon to work instead. McCanless testified that, later, Mogollon was hired when Pagan quit. The record thus supports the inference that Mogollon was recalled *because* Pagan quit.

[3] The majority wrongly contends that I would place the burden on the Employer to prove that Mogollon had a reasonable expectation of recall in the near future. I recognize that the Union (as the party contending that Mogollon was ineligible to vote) has the burden to show the absence of such an expectation. Like the hearing officer, and consistent with Board law, I find that the Petitioner met its burden.